IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

No. 584

WALTER M. PIERCE, as Governor of the State of Oregon; ISAAC H. VAN WINKLE, as Attorney General of the State of Oregon, and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon,

Appellants,

vs.

HILL MILITARY ACADEMY, A CORPORATION,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

SUPPLEMENTAL BRIEF OF APPELLEE, HILL MILITARY ACADEMY

When this appellee's brief was printed, the official reports containing certain statistics used in the brief were not available and the information was obtained

through the office of the Superintendent of Public Instruction of the State of Oregon. The official reports of that officer reveal that some of the statistics quoted in the brief are incorrect.

The following statistics apply to page 32 of this appellee's brief:

School Enrollment in the State of Oregon—

School Year	1922-1923	1923-1924
Public High Schools	32,603	34,719
Public Elementary Schools	136,773	140,791
Totals	169,376	175,510
Private High Schools	675	684
Private Elementary Schools	10,680	11,723
	11,355	12,407

The following statistics apply to page 26 of this appellee's brief:

School Enrollment in the United States:

Public Schools	23,777,705
Private Schools	1,699,481

Respectfully submitted,

JOHN C. VEATCH,
Attorney for Appellee,
Hill Military Academy.

Office Supreme Court, U. S.
FILED
MAR 16 1925
WM. R. STANSBURY
Clerk

Supreme Court of the United States

OCTOBER TERM, 1924.

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WALTER M. PIERCE, as Governor of the State of Oregon, and others,

Appellants,

against

THE SOCIETY OF THE SISTERS OF THE HOLY NAME OF JESUS AND MARY,

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against

HILL MILITARY ACADEMY,

Appellee.

Appeals from the District Court of the United States for the District of Oregon.

BRIEF FOR AMERICAN JEWISH COMMITTEE.

LOUIS MARSHALL,
Amicus Curiae.

PRESS OF FREDERICK PETER, 30 Washington Street, New York City.

Supreme Court of the United States

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BRIEF OF LOUIS MARSHALL, AMICUS CURIAE, ON BEHALF OF APPELLEES.

The comprehensive argument presented by Mr. Guthrie renders it unnecessary to enter upon a detailed discussion of the authorities bearing upon these cases. It is in every respect adopted by those

on whose behalf I am intervening—The American Jewish Committee, representing the parents of Jewish children and the teachers who maintain private schools for the education of Jewish children, in this country. They regard Chapter 1 of the General Laws of 1923 of the State of Oregon as an infringement upon the liberty of the individual and a deprivation of those who maintain such private schools, not only of their liberty, but also of their property.

Analysis of Statute.

An analysis of the legislative act which is challenged will be useful, for the purpose of ascertaining and measuring its effect. The statute makes it a misdemeanor for "any parent, guardian, or other person" having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over, to "fail or neglect or refuse to send such child to a public school for a period of time a public school shall be held during the current year" in the district in which the child resides.

This language is all-embracing. It relates to *any parent,* guardian or other person, and to *any child* between the age of eight and sixteen years, and makes the attendance of such child at a public school, as distinguished from a private or parochial school, of so obligatory a nature that the failure, neglect or refusal to send the child to such school becomes a criminal act, "each day's failure to send such child to a public school" constituting a separate offense.

This act is not a compulsory education law, the statutes of Oregon containing adequate provisions to require the attendance of all children within the

state at a public or private school, or at the home of the parent or guardian. It proceeds upon the clearly expressed theory of compulsory attendance at a public school. This is emphasized by the exceptions contained in the act, whereby it is provided that certain children "shall not be required to attend *public schools.*" They relate:

(a) To any child who is abnormal, subnormal or physically unable to attend school.

(b) To any child who has completed the eighth grade in accordance with the provisions of the state course of study.

(c) To children of certain ages who reside at a considerable distance from a public school, unless transportation to and from school is supplied by the school district, in which event the exemption from attendance at public school is not to apply.

(d) To any child taught by its parent or a private teacher such subjects as are usually taught in the first eight years in a public school. This is coupled with the condition that before such child can be taught by a parent or private teacher the parent or teacher must receive express permission from the county superintendent to teach. The child is required to report to the superintendent, or to some other person designated by him, at least once every three months, and to take an examination in the work covered. If the county superintendent shall determine that the child is not being properly taught he is to order the parent, guardian, or other person, to send the child to the public school for the remainder of the school year.

It is to be noted that the exception relating to children receiving private instruction is confined

to cases where the parent or a private teacher gives the instruction. That eliminates instruction in private or parochial schools.

The Effect of the Statute.

The manifest effect of this legislation, therefore, is to forbid instruction otherwise than in the public schools and by parents or private teachers under conditions set forth in the statute, and under the unlimited control of the county school superintendent, or of the person designated by him, and subject to his sole determination as to whether the parent or private teacher may instruct and as to whether or not proper instruction is given by them. This necessarily means the elimination of private and parochial schools, since it would be physically impossible for children of tender years, after having taken the course prescribed in the public schools, to attend any private or parochial school for the purpose of receiving instruction.

Prior to the passage of this act, under the law of Oregon parents were permitted to have their children taught in a private school. (Act of February 25, 1889, Chapter 1; Act of February 27, 1901, Section 1; Act of February 23, 1907, Section 1, subdivision a.) By the latest of these acts children were not required to attend public schools if taught in a private or parochial school for a period of time equal to that required in the public schools.

The Act of 1923 thus renders unlawful what previously had been lawful, not only pursuant to express enactment of the Legislature, but also according to the unquestioned practice of the citizens of Oregon from the days when it was still a territory.

In fact the public school has been a recent crea-

tion, dating from the middle of the nineteenth century. Prior to that time the only existing schools were private, parochial or denominational. Except in a few states, even at the present time, but few institutions of higher learning are public in character. They are conducted by private corporations, and to a large extent by institutions operated under denominational auspices. Many of our greatest universities were called into existence by religious bodies, and some of them are still conducted and managed by such bodies.

The Act under review is at present confined to the education of children between the ages of eight and sixteen years. If this legislation is valid, then it can be extended so as to include not only all minors, but all persons, regardless of age. It might limit the right of any person to secure an education except by attending a public institution. The right to choose the medium whereby an education is to be received is taken away, not only from the parent or guardian of the pupil or student, but also from the pupil or student himself. It matters not whether the public institution in the district in which the person for whom an education is sought or who seeks an education resides, may be of an inferior type or may be conducted by inefficient or temperamentally disqualified teachers. It matters not if a private or parochial school which has acquired a reputation for excellence and thoroughness, is conducted in the district. It matters not if personal or conscientious reasons exist which would lead to a preference for education in a private or parochial school rather than in a public school, or that the parents, or the children themselves, desire that instruction shall be given in a religious atmosphere. The statute categorically declares that the public school alone shall

and by whom instruction shall be given. If such power can be asserted, then it will lead inevitably to the stifling of thought. If the will of a temporary majority may thus control, then it is conceivable that it may prohibit the teaching of science, of the classics, of modern languages and literature, of art, and of nature study. A majority might reach the conclusion that the teaching of the Darwinian theory, or of the philosophy of Kant or Spinoza, or the ideas of Montesquine, or of Jeremy Bentham, or of John Stuart Mill, or of Emerson, should be prohibited. In some parts of this country a majority, if it possessed the power, would unquestionably limit instruction in the public schools to the Three R's. New York has recently witnessed an attempt to eliminate from the handbooks of history used in the public schools, any references to England which were not to its discredit, and any reference to America which, although truthful, did not indicate that it had at all times been immune to criticism.

Recognizing in the main the great merit of our public school system, it is nevertheless unthinkable that public schools alone shall, by legislative compulsion rather than by their own merits, be made the only medium of education in this country. Such a policy would necessarily lead to their deterioration. The absence of the right of selection would at once lower the standards of education. If the children of the country are to be educated upon a dead level of uniformity and by a single method, then eventually our nation would consist of mechanical Robots and standardized Babbitts.

On the theory which seeks to eliminate private and parochial schools, the Legislature might as well compel all of the inhabitants of the land to sub-

scribe to the same newspaper, to attend the same church, to become members of the same political party, and to join the same lodge. Indeed, it would be less of an invasion of liberty to do any of these things than to say to parents that, regardless of their ambitions and aspirations for their children, regardless of the love and affection which they bear to them, regardless of their conscientious beliefs respecting the duty which they owe for the ethical, moral and religious rearing of their children, the State may come in and take away from them that sacred right and the performance of the duty which they conscientiously believe that they owe to their children and to future generations. Our children do not belong to the State. As a rule the poorest of parents are better qualified to take care of their children than the best politician or professional agitator could possibly be.

The Arguments Advanced in Favor of this Legislation.

The arguments by the proponents of this measure submitted to the voters of Oregon prior to the election of November 7, 1922, are illuminating. It is stated that "the inspiration for this Act" is a resolution adopted by the Supreme Council A. A. S. Rite for the Southern Jurisdiction of the United States, by the Grand Lodge of Oregon F. & A. M., and by the Imperial Council A. A. O. Nobles Mystic Shrine. That resolution proclaims the belief of these councils "in the free and compulsory education of the children of our nation in public primary schools supported by public taxation, upon which all children shall attend and be instructed in the English language only without regard to race or creed, as the only sure foundation for the perpetua-

tion and preservation of our free institutions guaranteed by the Constitution of the United States."

This is scarcely the statement of a reason. It is an opinion by a group of private individuals, representing their personal preferences and evidently prepared to effectuate them by compulsory proceedings. Apparently they are seeking to compel those of various races and creeds to submit to their compulsory methods. They do not take into account the conscientious convictions of others, who, though willing to contribute their share of the taxation imposed for the support of public schools, are so strong in their preferences for private or parochial schools as to pay out of their own pockets, and not out of the public treasury, the cost of the education received by their children at such schools.

Certainly those who are ready to make this sacrifice, if such it may be called, are not indifferent to the cause of education, or to the public welfare, or to the future happiness of their own children. Nor are they hostile to our free institutions or to the guaranties of the Constitution because by their conduct they demonstrate their devotion to those guaranties of liberty which are enshrined in our organic law.

The solitary argument presented in this Official Pamphlet in favor of this legislation (Appendix I to Appellee's Brief, pp. 24, 25), contains the following additional statements:

> (a) "Our nation supports the public school for the sole purpose of self-preservation."

That is a fallacy. The nation does not support the public schools at all. The taxpayers in the various localities render such support. We may frankly concede that it is for the public welfare;

but that is subserved by private, parochial and religious schools, and by the instruction given by parents and private teachers as well. The aggregate of all of them constitutes the contribution by the public in its entirety to the cause of education.

The nation is no more preserved by the public school than it is by the other agencies. The Fathers of the Republic and a large proportion of our finest citizens never attended a public school, and today a large number of the best exemplars of Americanism have received and are receiving their education outside of public schools. In fact, in the City of New York the accommodation afforded by our public schools are inadequate to provide properly for the children of school age, and they are required to attend on part time or to seek instruction in private and parochial schools.

Under the Oregon statute, however inadequate the facilities of the public schools may be, attendance at private and parochial schools, however superior their accommodations and their instruction may be, is practically prohibited.

> (b) "The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools."

There is no foundation in truth for this statement. The private and parochial schools which exist throughout the country are conducted on the same patriotic lines as are our public schools. Those who are in responsible management and the teaching faculties are just as alive to the necessity of instilling the principles of our government in foreign and native born citizens alike, as are those

in charge of our public schools. They are men and women of education and culture who have devoted themselves to the sacred duty of educating the young, and who by their conduct have evinced the same patriotism as actuates the average citizen of the United States.

The assimilation, so-called, of our foreign born citizens is advanced rather than retarded by the private, parochial and religious schools. It is in such schools as these, of which many shining examples are to be found in every large community in the northern and eastern parts of the United States, that special efforts are made not only to educate the foreign born citizen, but the immigrant, in the fundamental principles of our government; and it may be said without exaggeration that our foreign born citizens frequently have a better understanding of the principles of our government than is possessed by many of our native born citizens. They have better opportunity to appreciate the differences between our form of government and that prevailing in the countries in which they were born, and they devote themselves with greater intensity to an understanding of those principles than is the case with many a descendant of the elder population.

> (c) "We must now halt those coming to our country from forming groups, establishing schools, and thereby bring up their children in an environment often antagonistic to the principles of our government."

The legislation of recent years has halted immigration into the United States, even though much of our growth and prosperity, as well as many other gifts, as recently pointed out by Dr. Charles W. Eliot, has been due to immigration.

There is no such thing as the creation by the newer population of an environment antagonistic to the principles of our government. Whatever their environment may be, their children cannot be distinguished from those who have long abided here, and they participate in everything that tends to the maintenance of the fundamental principles of our Federal and State governments. They have proven it by their devotion to our institutions both in times of peace and of war, and have supplied their full quotas to the armies of the Republic.

> (d) "Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American."

That is a mere figure of speech, which cannot stand the test of analysis. There is no such thing as a melting pot, anthropologically speaking. If there were, it would be a misfortune. However much iron and copper and lead and zinc and gold and silver may be mixed, the net result is a product which possesses none of the virtues of the original metals and is utterly useless. Far better would it be to purify and refine the original metals, for then their individual values would be enhanced. The difficulty with prejudices, even in the public schools, is that they are frequently aggravated by contact and collision. Among the advantages of private and parochial schools is the fact that there prejudices are apt to be mitigated. At all events they are not stimulated in a truly religious atmosphere or in a genuine cultural environment.

> (e) "The permanency of this nation rests in the education of its youth in our public schools, where they will be correctly instructed

> (f) "When every parent in our land has a child in our public school, then and only then will there be united interest in the growth and higher efficiency of our public schools."

What is to prevent the attainment of such higher efficiency, which evidently implies that that stage of efficiency has not been reached so long as there are children in the land who receive their education in private and parochial schools. Does efficiency depend upon numbers? Is it not the fact that the efficiency of many of our public schools has been hampered by the very fact that classes are too large, and that proper discipline cannot be maintained because of such numbers? Can it not be fairly said that so far as efficiency is concerned the highest achievement has thus far been witnessed in our private schools, as to which it was conceded by Mr. Claxton, former United States Commissioner of Education, that "the private schools and colleges have been the salvation of our public schools," and that "these private institutions have their place in our educational system; they prevent it from becoming autocratic and arbitrary and encourage its growth along new lines."

> (g) "Our children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, cliques or cults there to absorb the narrow views of life as they are taught."

Here those who send their children to private and parochial schools because of their creed are charged with constituting antagonistic groups and as absorbing "narrow views of life." In other words, parents who are anxious for the future welfare and happiness of their children and who seek

to dedicate them to moral, ethical and religious principles, are denounced for sending their children to private and parochial schools, because, forsooth, the views of life which they there absorb are characterized as "narrow".

What does that mean but an attempt on the part of the protagonists for this law to sit in judgment upon their fellow-citizens whose ideals differ from theirs? How does such a mental attitude differ from that which prevailed when governments sought to enforce uniformity of religious beliefs and punished nonconformists as criminals? With the most extraordinary ingenuousness they look upon those of other cults as striving "not for the good of the whole but for the supremacy of themselves." What about the cult of those who adopted the resolutions which are described as "the inspiration for the Act," of those who are seeking to force the youth of this country into the public schools and to destroy private and parochial schools, regardless of the wishes of parents and guardians and of the various religious elements in our poulation?

This is a demonstration of the evils of intolerance and of the dangers inherent in this legislation, which undermines the fundamental concepts of liberty and which has the inevitable tendency of carrying us back to those evil days which preceded the adoption of our American Constitutions.

The noble words uttered by the President on his inauguration a few days ago, redeclare the great truth which is ignored in this legislation:

> "The fundamental precept of liberty is toleration. We cannot permit any inquisition either within or without the law or apply any religious test to the holding of office. The mind of America must be forever free."